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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ELIJAH DEMITRICE POUNCEY,

Defendant and Appellant.

B290428

(Los Angeles County
Super. Ct. No. BA369280)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Elijah Demitrice Pouncey appeals from an order denying his petition for recall of sentence and resentencing under Proposition 36, the Three Strikes Reform Act of 2012. He contends the trial court erred in finding he was ineligible for resentencing based on a finding that he was armed during the commission of his third strike offense, possession of a firearm by a felon. We affirm.

BACKGROUND

A jury convicted Pouncey of possession of a firearm by a felon (Pen. Code,¹ former § 12021, subd. (a)(1), now § 29800, subd. (a)(1)) and possession of ammunition by a felon (former § 12316, subd. (b)(1), now § 30305, subd. (a)). The trial court found true the allegations Pouncey had suffered two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12). It sentenced him to a three strikes term of 25 years to life for his conviction of possession of a firearm by a felon and stayed sentence on the conviction of possession of ammunition by a felon.

Pouncey's conviction arose from a dispute with a friend. When she asked him to leave her home, she heard gunshots in her front yard and called 911. Police officers later apprehended Pouncey. They found a loaded gun in his car.

We affirmed Pouncey's conviction. (*People v. Pouncey* (Mar. 8, 2012, B230061) [nonpub. opn.] [2012 WL 762165].)

On December 12, 2012, Pouncey filed a petition for recall of sentence under Proposition 36. The trial court issued an order to show cause why the petition should not be granted on

¹ All further statutory references are to the Penal Code.

February 25, 2013. The People filed opposition to the petition on January 9, 2014, taking the position that Pouncey was neither eligible nor suitable for resentencing.

Following various delays, on May 21, 2018, the trial court found beyond a reasonable doubt that Pouncey was statutorily ineligible for resentencing pursuant to section 1170.126, because during the commission of the offense he used a firearm and was armed with a firearm. Pouncey timely appealed.

DISCUSSION

A defendant is eligible for recall of sentence and resentencing under Proposition 36 if (1) the current offense is not one defined as a serious or violent felony and is not specified in the three strikes law as a disqualifying conviction, and (2) the defendant has no prior disqualifying convictions. (§ 1170.126, subd. (e).) Disqualifying convictions include those in which, “[d]uring the commission of the . . . offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii); see § 1170.126, subd. (e)(2).)

Pouncey contends that the armed exclusion from eligibility for resentencing does not apply to possession of a firearm by a felon. Pouncey acknowledges that this contention, in various forms, has been rejected by the Court of Appeal. (See *People v. Cruz* (2017) 15 Cal.App.5th 1105, 1111-1112; *People v. Valdez* (2017) 10 Cal.App.5th 1338, 1356; *People v. Frutoz* (2017) 8 Cal.App.5th 171, 175-176, 177-178; *People v. White* (2016) 243 Cal.App.4th 1354, 1363; *People v. Hicks* (2014) 231 Cal.App.4th

275, 283-284; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 798-799; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1032, disapproved on another ground in *People v. Frierson* (2017) 4 Cal.5th 225, 240, fn. 8; *People v. White* (2014) 223 Cal.App.4th 512, 525; see also *People v. Piper* (2018) 25 Cal.App.5th 1007, 1015-1016.) Instead, the courts have held that the exclusion requires only a temporal nexus to the offense of possession of a firearm by a felon (*People v. Estrada* (2017) 3 Cal.5th 661, 670), and so long as the firearm is available for offensive or defensive use, the exclusion applies (*Osuna, supra*, at p. 1029).

We decline Pouncey's request that we reject these decisions on the proffered ground that the armed with a firearm exclusion does not apply to possession of a firearm by a felon. It follows that Pouncey was ineligible for resentencing under Proposition 36 and the trial court did not err in denying his petition.

DISPOSITION

The order is affirmed.

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JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.